(20) AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Misc. Petition 31 of 2007

Gyan Chandra Agrawal

Vs.

Central Bureau of Investigation

ORDER

Post for 07.05.2007

Sd/-
SUNIL KUMAR SINHA
Judge

Seen
Sinha
07-5-2007

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Misc. Petition 31 of 2007

Petitioner: Gyan Chandra Agrawal,
s/o Late Mahaveer Agrawal,
Aged about 48 years,
R/o 52/15, Nehru Nagar,
East Bhilai,
District Durg, Chhattisgarh

Vs.

Respondent: Central Bureau of
Investigation, Camp: Bhilai,
Sector-9, Bhilai, Distt.
Durg, Chhattisgarh

CRIMINAL MISC. PETITION U/S 482 OF THE CODE OF CRIMINAL PROCEDURE

Appearance:

Shri Sanjay K. Agrawal, counsel for the petitioner.

Shri Shailendra Dubey, counsel for the respondent/C.B.I.

ORDER
(07.5.2007)

Sunil Kumar Sinha, J,

(1) "Whether a person, who has been granted an order of compulsive bail u/s 167(2) of the Code of Criminal Procedure by the Magistrate and who did not furnish bail-bond for a long time pursuant to the order and a charge sheet was filed, in the meanwhile, can be subsequently released on such bail on his furnishing bail-bond on the strength of the earlier order ?, is a short question raised for consideration in this petition.

(2) The brief facts are that this petitioner is an accused in Crime No.76 of 2004 registered at Police Station, Bhilaibhatti for the offence punishable u/ss 420, 467, 468, 469 & 471 of the

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I.P.C. Firstly, he moved an application for grant of anticipatory bail in the said crime which was dismissed by the High Court on 18th of August, 2004 and the matter was directed to be investigated by the Central Bureau of Investigation (for short "C.B.I"). Consequently, the matter was transferred to the C.B.I., where it was registered as Crime No.R.C.10(A)/04/C.B.I./ Jabalpur, (Case Diary No.44). The petitioner was arrested in the said Crime Number. He made an application before this Court vide M.Cr.C.No.3266/2005 for grant of regular bail u/s 439 Cr.P.C. The aforesaid application was dismissed by the High Court by order dated 16.2.2006. Thereafter, since the prosecution could not file a charge sheet in time, an application u/s 167(2) Cr.P.C. was filed by the petitioner. This application came up for hearing before the Special Magistrate (C.B.I) on 10.3.2006, who allowed the same and passed an order u/s 167(2) directing the petitioner to furnish two solvent sureties of Rs.50,000/- each with a personal bond in sum of Rs.1 lakh (one lakh) for his release on compulsive bail. It is important to mention this fact here that the petitioner did not comply with the bail order granted by the Magistrate (C.B.I.) as he did not furnish bail-bond pursuant to the said order, because according to the petitioner, in the meanwhile, he was also arrested in Crime No.77/2004 registered at Police Station Bhilaibhatti, Distt. Durg for commission of another offence punishable u/ss 420, 468, 469 and 471 of I.P.C., for which a bail application (M.Cr.C.No.2528/2006) was filed before the High Court. The

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said bail application, seeking regular bail in Crime No.77/2004 was dismissed by the High Court on 21.11.2006. Against the aforesaid order of dismissal, the petitioner moved a Special Leave Petition before Hon'ble the Supreme Court bearing Special Leave to Appeal (Criminal) No.6485/2006 (Gyan Chandra Agrawal –Vs- State of Chhattisgarh). The aforesaid S.L.P. came up for hearing before the Supreme Court on 15.12.2006, where it was directed that the petitioner shall be released on bail on his furnishing two sureties of Rs.25,000/- and a personal bond of the like amount to the satisfaction of the trial Court.

(3) According to the petitioner has furnished bail bond in Crime No.77/2004 and necessary orders were passed in that case, however, he could not be released from jail as he was also required in earlier Crime No.76/2004 (Changed No.R.C.10(A)/04/C.B.I./Jabalpur, (Case Diary No.44.C.B.I) because he had not furnished bail-bond pursuant to the order passed by the Magistrate (C.B.I) u/s 167(2) Cr.P.C. in the said case.

(4) Thereafter on 19.12.2006 the petitioner furnished bail bond pursuant to the order of the Magistrate dt.10.3.2006 which was not accepted by the Magistrate on the ground that by that time on 30.3.2006, the C.B.I. has already filed a charge sheet in the matter and now after filing of the charge sheet as aforementioned, the petitioner could not be released in pursuance of the order dt.10.3.2006 passed u/s 167(2) Cr.P.C.

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(5) The order passed by the Magistrate (C.B.I) was challenged before the Special Judge (C.B.I), Raipur in Criminal Revision No.2/2007. The learned Special Judge dismissed the revision confirming the order passed by the Magistrate on the ground that the petitioner was not entitled to be released on the strength of the earlier order dated 10.3.2006 passed u/s 167(2) Cr.P.C. after a lapse of long period, particularly, when in the meanwhile, charge sheet has already been filed by the C.B.I. It is against these orders passed by the two Courts below the petitioner has filed this Criminal Misc. Petition.

(6) Learned counsel for the petitioner, placing reliance on two decisions of the Apex Court rendered in the matter of ***Raghubir Singh and others –Vs- State of Bihar (1986) 4 S.C.C. 481*** and ***Aslam Babalal Desai –vs- State of Maharashtra (1992) 4 SCC 272*** argued that there is no limitation for furnishing bail bond pursuant to the order passed u/s 167(2) Cr.P.C. and the Courts below were not justified in not accepting the bail papers filed by the petitioner for his release on compulsive bail on the strength of earlier order passed in his favour. He further argued that subsequent filing of the charge sheet, no where comes in the way once an order of compulsive bail is granted in favour of the accused and the bail bond has to be accepted respecting the mandate of section 167(2).

(7) Per contra, learned counsel for the C.B.I., referring to the decision rendered in the matter of ***Uday Mohanlal Acharya – vs- State of Maharashtra, (2001) 5 SCC 453*** argued that right

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to be released on compulsive bail gets extinguished on subsequent filing of charge sheet if the same is not availed by the accused, particularly when the order of release was passed in his favour, but he did not furnish bail-bond pursuant to the said order.

(8) I have heard learned counsel for the parties at length and have also perused the records of the Misc. Cri. Petition.

(9) In *Raghubir singh's case (Supra)*, while dealing with effect of the new proviso to section 167, the Apex Court observed vide para 20 that the effect of the new proviso is to entitle an accused person to be released on bail if the investigating agency fails to complete the investigation within 60 days. A person released on bail under the proviso to Section 167(2) for the default of the investigating agency is statutorily deemed to be released under the provisions of Chapter XXXIII of the Code for the purposes of that chapter, which is provided by the proviso itself. The Supreme Court observed that it means, first, the provisions relating to bonds and sureties are attracted. Section 441 provides for the execution of bonds, with or without sureties, by persons ordered to be released on bail. One of the provisions relating to bonds is Section 445 which enables the Court to accept the deposit of a sum of money in lieu of execution of a bond by the person required to execute it with or without sureties. If the bond is executed (or the deposit of cash is accepted), the court admitting an accused person to bail is required by Section 442(1) to issue an order of release to the

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officer-in-charge of the jail in which such accused person is incarcerated. Sections 441 and 442, to borrow the language of the Civil Procedure Code, are in the nature of provisions for the execution of orders for the release on bail of accused persons. The Supreme Court observed that what is of importance is that there is no limit of time within which the bond may be executed after the order for release on bail is made. Very often accused persons find it difficult to furnish bail soon after the making of an order for release on bail. The Apex Court further observed that this frequently happens because of the poverty of the accused persons and it also happens frequently that for various reasons the sureties produced on behalf of accused persons may not be acceptable to the court and fresh sureties will have to be produced in such an event. The Court said that the accused persons are not to be deprived of the benefit of the order for release on bail in their favour because of their inability to furnish bail straightway. Orders for release on bail are effective until an order is made under Section 437(5) or Section 439(2). These two provisions enable the magistrate who has released an accused on bail or the Court of Session or the High Court to direct the arrest of the person released on bail and to commit him to custody. The Court said that since release on bail under the proviso to section 167(2) is deemed to be release on bail under the provisions of Chapter XXXIII, an order for release under the proviso to section 167(2) is also subject to the provisions of section 437(5) and 439(2) and may be extinguished

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by an order under either of these provisions. The Apex Court has quoted the instance of change of surety u/s 444 and said that the order of release on bail is not extinguished and is not to be defeated by the discharge of surety and the inability of the accused to straightway produce a fresh surety in that case. This all was said by the Apex Court in view of the arguments raised by the counsel for the State of Bihar that the order for release on bail stood extinguished on the remand of the accused to custody u/s 309(2) Cr.P.C. The Apex Court said that there is no substance whatever in this submission. Section 309(2) merely enables the Court to 'remand the accused if in custody'. It does not empower the Court to remand the accused if he is on bail. It does not enable the Court to 'cancel bail' as it were. That can only be done u/s 437(5) and section 439(2) . Finally it said in this paragraph that when an accused person is granted bail whether under the proviso to section 167(2) or under the provisions of Chapter XXXIII, the only way the bail may be cancelled is to proceed under Section 437(5) or Section 439(2).

(10) The Apex Court summarized that an order for release on bail made under the proviso to section 167(2) is not defeated by lapse of time, the filing of the charge sheet or by remand to custody u/s 309(2). The order for release on bail may however be cancelled u/s 437(5) or section 439(2) Cr.P.C. Generally, the grounds for cancellation of bail, broadly, are interference or attempt to interfere with the due course of administration of justice, or evasion or attempt to evade the course of justice, or

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abuse or the liberty granted to him. Where bil has been granted under the proviso to section 167(2) for the default of the prosecution in not completing the investigation in 60 days, after the defect is cured by the filing of a charge sheet, the prosecution may seek to have the bail cancelled on the ground that there are reasonable grounds to believe that the accused has committed a non-bailable offence and that it is necessary to arrest him and commit him to custody and that such release on bail under the proviso to section 167(2) does not come to an end with the passage of time on the filing of the charge sheet.

(11) In *Aslam Babalal Desai's case (supra),* while considering the question as to whether the bail granted under the provis o to sub-section(2) of section 167 Cr.P.C. for failure to complete investigation within the period prescribed thereunder, be cancelled on mere presentation of challan at any time thereafter, the Apex Court, citing the judgments of *Raghubir Singh's case* and various other judgments on the point ruled that once an accused is released on bail u/s 167(2), he shall not be taken back in custody merely on the filing of the charge sheet, but there must exist special reasons for so doing besides the fact that the charge sheet reveals the commission of a non-bailable crime. This view was taken by the Apex Court consistent with the earlier views in the case of ***Bashir and others –vs- State of Haryana (1977) 4 SCC 410*** and *Raghbir's case (supra).*

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(12) However, thereafter while dealing the case u/s 167(2) in the matter of *Uday Mohanlal Acharya (supra)*, it was concluded by the Apex Court, per majority, as follows:

(i) "Under sub-section(2) of section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorize detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.

(ii) Under the proviso to the aforesaid sub-section(2) of Section 167, the Magistrate may authorize detention of the accused otherwise than in the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.

(iii) On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.

(iv) When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge sheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/Court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency

in completing the investigation within the period stipulated.

(v) If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation-I and the proviso to sub-section(2) of section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorized, and therefore, if during that period the investigation is complete and the charge sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

(vi) The expression "if not already availed of" used by this Court in *Sanjay Dutt Case* must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para (a) of the proviso to sub-section (2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same."

(13) This judgment rendered by the Apex Court embodies the citations of *Raghubir Singh's case, Aslam's Case (supra)* and also the Constitution Bench decision of ***Sanjay Dutt –vs- State through C.B.I., (1994) 5 SCC 410*** and thereafter the final outcome per majority has been recorded as above.

(14) Therefore, in view of the above and also in view of the provisions of section 167, it is clear that section 167 gives power to the Magistrate permitting detention of an accused in custody and prescribing maximum period for which an accused can be detained. The proviso to sub-section (2) of section 167 deals

with the consequences and it clearly indicates that if the investigation is not completed within a period of 60 days or 90 days as the case may be, the accused shall be released on bail, *if he is prepared to and does furnish bail* which is commonly called as compulsive bail and further that the aforesaid release shall be deemed to be so released under the provisions of Chapter XXXIII for the purpose of that chapter. The Explanation-I to section 167 makes it clear that this right of the accused can only be denied when an accused does not furnish the bail as per the order of the Magistrate. This provision was engrafted in chapter XII Cr.P.C., for preventing long prolongation of the investigation and thereby keeping the detention of the accused in jail to *ad-infinitum*. Under the proviso to sub-section(2) of section 167, now the Magistrate can detain the accused otherwise than in the custody of the Police for total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence and on expiry of such period, an indefeasible right accrues in favour of the accused for being released on bail on account of not filing of the charge sheet, this is subject to that the accused must be prepared to and furnishes the bail bond as directed by the Magistrate but in case where the accused is unable to furnish bail as directed by the Magistrate, the continued custody of the accused even beyond the statutorily specified period will not be unauthorized and if during this

period the investigation is complete and the charge sheet is filed, the said indefeasible right of the accused would stand extinguished. That is what the Apex Court has said in *Uday Mohanlal Acharya's case (supra)* vide conclusion No.5.

(15) In the present case, no doubt, the indefeasible right had accrued in favour of the petitioner when the investigation was not completed and the charge sheet was not filed within the stipulated period and for this reason, the Magistrate (C.B.I) passed an order of compulsive bail on 10.3.2006 under the proviso to section 167(2) Cr.P.C. But for the reason best known to the petitioner, the bail bond so directed to be furnished by the order of Magistrate were not furnished by the petitioner and ultimately they did not furnish it upto 19.12.2006 and after a lapse of such a long period of about more than 9 months, the petitioner furnished bail bond on 19.12.2006, but by that time the investigation was completed and the charge sheet was already filed on 30.3.2006. Therefore, certainly the indefeasible right accrued in favour of the petitioner on account of not filing of the charge-sheet within the statutory period, after not filing of the bail bond as per the directions of the Magistrate dated 10.3.2006, stand extinguished on 30.6.2006 . The Magistrate as well as the Sessions Court had rightly rejected the prayer of the petitioner for releasing him on compulsive bail on the strength of the order dated 10.3.2006 by accepting the bail bond in the changed scenario on 19.12.2006 as the aforesaid right had extinguished by that time and the petitioner was rightly not

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released on the strength of the earlier order passed u/s 167(2) Cr.P.C. There appears to be no illegality in the orders passed by the two Courts below. The petition has no merit and the same is dismissed.

Sd/-
SUNIL KUMAR SINHA
Judge

(Rao